No. 77-1569

In the Supreme Court of the United States

October Term, 1977

ANTHONY B. CATALDO and ADA W. CATALDO,
Petitioners,

v.

DAVID P. LAND, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN REPLY

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QUESTIONS INVOLVED

1.) Have respondents failed to meet the charge of perjury made by petitioner and the effects of such criminal conduct on this litigation? Obviously, yes, as respondents say nothing about the perjury committed by Levine and suborned by the government's attorneys, Land and Reilly.

ARGUMENT IN REPLY

Petitioner has submitted to this court a copy of Appellant's appendix filed in the Court of Appeals. An underlying reason for such filing was the fact that in enumerating the ways in which District Judge Levet was deceived, in the tax refund action, the facts of deception as stated in the petition to this court may not have clearly established the perjury and subornation of perjury which was one of the basic facts upon which this suit was predicated. Petitioner will now clarify how the record shows that perjury was committed and suborned.

The first topic of perjury was the denial on the trial by Levine that he had ever seen a lawyer's diary which petitioner-lawyer had testified was the record of his petty cash expenditures for the year in question. Petitioner had testified that the government auditor had gone through the diary and had allowed some $2,200 of expense and disallowed about $1,500 of such ex-

pense because the disallowed items were for more than $25 each, while the allowed items were for less than $25 each. Petitioner was claiming that the disallowance was arbitrary because the notations in the diary showed the amount and the purpose of the expense. That was an issue under the pleadings of the tax refund suit.

At the trial, the government listed in its trial memorandum that even the $2,200 should be disallowed. This was the first notice had by petitioner of such claim. There were no amendments to the government's anwer.

Petitioner testified that he no longer had the diary, because it was found missing in 1972 after he had moved his offices from John Street to Broadway in Manhatten. The diary had been in a drawer of his desk, which desk he had the movers take to their showroom for resale. The moving was done in petitioner's absence, for, at the time, he was in Lenox Hill Hospital for

observation for a possible stroke. See pp. 26-27.

In support of the items that had been contained in the diary, petitioner had planned to use a listing of the items he had taken from the diary at the time he had made out the income tax return. The list was written onto yellow sheets of paper, usually found in pads in law offices.

Both the diary and the sheets of yellow paper were exhibited and turned over to the auditor, and later to the Appellate Division of Internal Revenue. Agent Levine was required by the Appellate Division to re-audit petitioners books. When Levine made his audit, he was given the diary. He took taps of the diary entries.

On the trial, Levine testified that he had never seen a diary, a lawyer's diary, that he had seen a yellow sheet of paper instead, see pp. 67 and 68 of Appendix. Levine had also

testified at a pre-trial deposition as a witness for the government. There he stated, that he had been given the diary at the time of his audit and had taken taps of the items of expense, see pp. 23-26 and 73-78.

Also Levine stated at the trial that two items disallowed by the Commissioner, one of $1,084.57 and the other for $2,282.58 were properly disallowed, see p. 28. But on the said deposition, he had stated they were not related to deductions and were irregular. Relying on this latter statement, petitioners had hoped to prove that the assessments were incorrect and arbitrary and not entitled to the presumption of correctness. But, at the trial, the government claimed that petitioners had the burden of proof throughout, of the correctness of the expenditures and convinced the court to apply that unlawful rule.

The government also objected to the list of expense as had been prepared as stated above

and objected to petitioners testimony about the loss of his diary. Both were excluded. In its memorandum after trial, the government argued that both the items under $25 and those over $25 should be disallowed and they were. Accordingly, petitioners felt that as a result of the perjury, and its subornation, and the unlawful objections made by government counsel, aided by the subversive action of Mr. Madden, with collusive intent to deceive the Court, he lost his case for a refund. Yet, petitioner had paid monies upon an assessment that clearly rested upon arbitrary action of the commisioner. The issues, at trial, were unlawfully reshuffled by defense counsel making, in the government's trial memorandum, new claims of items of expenses disallowed, without notice to petitioner.

The question is, may the government's representatives rest upon perjured testimony to win a case for a tax refund, and escape their liability for such criminal conduct? Wasn't the

taxpayer denied due process by the proceedings followed at the trial? At least, it has been established by this Court in Hazel Atlas v. Hartford, 322 U.S. 325 that such actions would nullify the judgment in the tax refund suit. Then, why should res judicata or collateral estopple as found by the courts below, operate to defeat this suit? Aren't these questions within the ambit of the supervisory powers of this honorable court over the performance of Federal Courts, generally, and in particular, over a fraud action arising out of judgment rendered unlawful by fraud and deceit practiced upon the Court? Doesn't the supervisory power of this court extend over the performance of the government in the prosecution of its tax claims? Wouldn't a recognition by this court of the necessity to set aside a judgment fraudulently obtained by the government, reaffirm to the American people that the government is righteous and will not misuse its courts to win a tax

case?

Respectfully submitted,

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